

T O O U R F R I E N D S A N D C L I E N T S

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SEC Proposes Changes to Further Ease Pre-Offering Communication by WKSIs

The Securities and Exchange Commission has proposed amending Rule 163(c) under the Securities Act of 1933 to allow a well-known seasoned issuer (“WKSIs”)¹ to authorize an underwriter or dealer to act as its agent or representative in communicating about offerings of the WKSIs’ securities **prior to** the filing of a registration statement in a registered public offering. The stated goal of this proposed amendment is to further facilitate WKSIs capital formation by removing certain impediments to pre-offering communications with broader groups of potential investors. Comments to the SEC in response to the proposed amendment must be received on or before January 27, 2010.

Rule 163 was originally adopted in order to allow WKSIs to engage in oral and written communication before the filing of a registration statement for the offered securities without running afoul of “gun-jumping” provisions. At the time the rule was passed, the SEC assumed that most WKSIs would have a universal automatic shelf registration statement on file. However, in proposing the amendment, the SEC acknowledges that notwithstanding initial expectations, many WKSIs issuers have not filed such a registration statement or have filed a shelf registration statement limited to select securities (for example covering only equity securities or debt securities). In such situations, the issuer may want to assess the level of investor interest in its securities, something an underwriter or dealer is better positioned to assist in doing. As currently stated, the Rule 163 exemption is not available for communications made by an offering participant that is an underwriter or dealer, a limitation which could create an impediment to WKSIs’ communications with potential investors to determine market appetite for a potential registered offering of its securities.

The proposed amendment to Rule 163 would allow underwriters and dealers to act as agents or representatives of WKSIs under certain circumstances² and would enable WKSIs to better gauge the

¹ A WKSIs is an issuer that has at least \$700 million in market value of outstanding common equity held by non-affiliates (or has issued, for cash, within the last three years at least \$1 billion aggregate principal amount of non-convertible securities through primary offerings registered under the Securities Act); and is not an “ineligible issuer,” as defined in SEC rules.

² The underwriter or dealer must receive authorization from the WKSIs to act as its agent or representative, the WKSIs must give prior approval to any communication and any such authorized underwriter or dealer that has made any authorized communication must be identified in any prospectus contained in the registration statement that is filed for the offering to which the communication relates.

level of interest in the market for an offering, thus removing an impediment to the ability of WKSIs to raise capital through registered offerings rather than through private offerings, including offerings conducted under Rule 144A.

Given the recent extreme volatility of the capital markets, and the accompanying diminished visibility into investor appetite in conjunction with the significant negative stigma which can arise for issuers who launch and fail to close capital markets transactions, pre-marketing activities have become increasingly common in non-registered offerings. In proposing the amendment, the SEC is acknowledging the central role generally played by underwriters in pre-marketing activities and is hoping to ease the path for WKSI issuers to access the market through registered transactions by attempting to level the playing field for WKSIs between private and public offerings. These changes will not explicitly impact pre-marketing of Rule 144A offerings which underwriters have been conducting under the current regulatory framework within proscribed limitations to ensure pre-marketing activities are conducted in a manner satisfying certain general solicitation and selective disclosure concerns.

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